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Law Revision in Louisiana in Retrospect*

*J. Denson Smith***

Ethnologically, the story of Louisiana abounds with fascination. From the hills of Bossier, Claiborne, and East Carroll, to the marshes of Cameron, Terrebonne, and Plaquemines there is spread a mixture of peoples whose diverse talents have enriched the life of Louisiana as significantly as the genius of their forebears has enriched the history of the world. They are versatile people, and imaginative. They have possessed the ability to enjoy life in its appealing simplicity where the touch of nature is soft and gentle and they have created grandeur and beauty in many wondrous ways. Their contributions to the culture of our country have enriched the language, literature, architecture, the beaux-arts, and the physical and social sciences, with especial emphasis on the science of government. They seem to have been endowed with a natural yearning for perfection in their legal system that has continued to assert itself in positive fashion since the time they lived under the rule of the King of Spain. The story of Louisiana's struggle for a simple and just system of laws has added particular luster to her many notable achievements.

During the colonial period, the inhabitants of Louisiana had lived for seventy years under the rule of France when, in 1769, by direction of their new ruler, the King of Spain, the French law was supplanted by the Spanish. O'Reilly, Captain General of the Territory, promulgated the change that remained effective for the next thirty-four years. In 1803, twenty days after the reacquisition of the Territory by France, it was delivered to the United States. In one of his first official actions Governor Claiborne undertook to provide a remedy for the difficulties stemming from the rapid changes in allegiance by establishing a court of common pleas modelled after the common law, with jury trials, and with appellate authority vested in the Governor. Contrary to the established custom, practice and procedure were to be in English. But the people were not submissive. Their opposition

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to this system, counted by many as alien and undesirable, materialized immediately.

Soon another act of Congress replaced Claiborne's arrangement with another system of courts, and shortly thereafter, Judge Prevost of the Superior Court established by the act, held that the Spanish law had been recognized as "the law in force in the Territory," a position later sustained by the full court.

When the first legislature for the Territory met in New Orleans on March 25, 1806, the determination of the people to accomplish a clarification and simplification of their legal system again manifested itself in the appointment by the Legislature of James Brown and L. Moreau Lislet as a committee to prepare a civil code for the Territory. Thus was the first significant step taken toward law revision and reform in Louisiana.

These gentlemen were instructed to make the civil law by which the Territory was then governed the ground-work of the new code. However, the "Digest of Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments adapted to its present system of Government" which they presented to the Legislative Council in 1808, was in large measure based on what was perhaps an early draft or projet of the Code Napoleon. Within this framework the redactors incorporated portions of the Spanish law. When the Supreme Court subsequently held that the Spanish law in general remained in force in Louisiana to the extent that it was not irreconcilable with the provisions of the new code, it must have been very clear that endless confusion would result from the necessity of undertaking to determine whether in any given case the provisions of the new code or of the Spanish law would control, a confusion compounded by the fact that the Spanish law itself was most difficult to determine. As a result, the Legislature moved again in the direction of revision.

In the meantime an effort had been made to overcome the additional difficulties arising from a variety of legislative enactments and Governors' ordinances through the appointment of Francois Xavier Martin to prepare a digest of the laws then in force, not including the Civil Code, without altering their phraseology. The result of Judge Martin's labors appeared in 1816, in three volumes. A further effort to ameliorate the troublesome lack of knowledge of the law was taken in the form of a legisla-

tive decision to publish a translation of *Las Siete Partidas* which had been begun by Moreau Lislet and Henry Carleton. But these steps were not enough for a people determined to do something to achieve a more permanent and enlightened ordering of their society. Hardly had the translation of the *Partidas* been printed when the Legislature, by an act of March 14, 1822, constituted Edward Livingston, Pierre Derbigny and L. Moreau Lislet as a committee to revise the Civil Code "by amending it in such manner as they may deem advisable."

It should be noted also that in 1821, the preceding year, the Legislature had appointed Livingston to a committee to revise the penal laws of Louisiana. Although the penal code which he prepared was not adopted by the Legislature, nor, despite his efforts as United States Senator, was it adopted by the Congress as a "System of Penal Laws for the United States of America," it brought him international acclaim. The appointment of the Livingston-Derbigny-Lislet committee to revise the Civil Code, and to include also a system of commercial law and rules of practice for civil actions, resulted in the production of the Civil Code and the Code of Practice of 1825.

This is neither the time nor the place to deal in detail with the nature and general characteristics of the Code of 1825 or the degree to which it reflects, on the one hand, the Code Napoleon, or on the other, the laws of Spain. Indeed, these matters have been brilliantly presented by Judge Hood. Suffice it to say that the uncompromising resolution of the people to overcome the lack of definiteness and clarity in their system of laws had produced a code that we have been able to live with, without any real revision, for more than 130 years, which constitutes the finest evidence of its merit.

In the intervening years, other digests of the general statutes were published and the first revision of the statutes was directed by the Legislature in 1854 and adopted in 1857. At the same session of the Legislature that ordered the revision of the Civil Code and the Code of Practice, as well — that of 1868 — a revision of the general statutes was again directed. This was also the same year that the first new constitution following the Civil War was adopted — often called the Carpet Bag Constitution.

A revision of the Civil Code was made in 1870, but it was not in any sense a thoroughgoing and complete revision. Indeed it

was simply a consequence of the many changes that had been wrought in the political and economic structure of the state by the Civil War and was actually nothing more than a rewriting of the Code of 1825 except that all articles relating to slavery were eliminated and there was an incorporation and integration of legislation amendatory of and supplementary to the Code.

Another attempt was made to revise our basic civil law in 1908 when the Legislature created a commission to propose a revision and reenactment of the Civil Code. The projet was submitted to the Legislature a few days before it convened in 1910 with the result that its consideration was postponed until the next session. In the interim, the Louisiana Bar Association appointed a committee to review and criticize the draft. The report of the committee to the Association in 1913 recommended that it request the general assembly not to enact the proposed code. The committee report was unanimously approved. This opposition proved to be successful for the projet was never adopted by the Legislature.

In passing, it is interesting to note that the committee's unfavorable report pointed out that the time involved, two years, was too short a time for the proper revision of the Code; that the commission established, consisting of three members, was too small; that instead of deleting the many provisions of a procedural nature in the code the commissioners had aggravated this undesirable condition; that unnecessary and dangerous changes in phraseology were made; that many proposed changes in substance could not be supported; that many antiquated and useless provisions had been retained; and, in general, that in revising the Civil Code more attention should have been given to what had been done in the way of code revision by a number of mentioned foreign countries. Incidentally, the Bar Association reports show that a poll of the membership supported the committee in its rejection of the proposed revision.

In the area of the criminal law unsuccessful efforts were made in 1884, 1898, and 1910 by the Seay, Thompson, and Marr commissions acting under legislative appointment to prepare and secure the adoption of a Code of Criminal Procedure. In 1926 an amendment to the Constitution removed certain obstacles to the adoption of such a code and authorized the appointment of another commission. It was headed by the late St. Clair Adams and had Howard Warren and S. R. Thomas as members. Its

labors resulted in the present Code of Criminal Procedure that was adopted in 1928.

In later years a serious effort was made toward the preparation and adoption of a code of mineral law, but without success.

This brings us down to the beginning of the story of the Louisiana State Law Institute. The idea for the creation of such an agency had its beginning in 1933, and steps were taken to carry it out, but the financial crisis that developed at that time forced a postponement of its realization until 1938. In that year the Board of Supervisors of the Louisiana State University authorized the establishment of the Louisiana State Law Institute and later the same year the Institute was chartered by the Legislature.

To some perhaps appreciable extent the creation of the Institute may be attributed to the genius of the jurisconsults who gave Louisiana its first effective Civil Code in 1825. Their thinking, reaching out over more than a hundred years, found its expression in the hopes and aspirations that joined in the Institute's conception. For it was they who envisioned a process of constant watchfulness of the application of the laws by the courts, supported by regular reports to the Legislature, in order to foster and protect the unity of design of the new codes against the inevitable inroads that would come from their judicial construction and from statutes hastily passed by the Legislature.

Much of what was foreseen when the Louisiana State Law Institute was established can now be listed among its accomplishments. In the comparatively short period of its existence it has produced such major accomplishments as the Louisiana Criminal Code, the Louisiana Revised Statutes, the projet of a new constitution for the State of Louisiana, a projet for the revision of the Louisiana Code of Practice which will soon be completed, and a translation of Planiol's treatise on the civil law of France, the first work of this kind in more than a century.

In addition to these major projects the Institute completed the preparation of a Compiled Edition of the Civil Code, and a reprinting of the Projets of the Civil Code and Code of Practice of 1825 and has prepared a compilation of statutory enactments related to the Civil Code. It has also presented to the Legislature from time to time a considerable number of proposed statutes dealing with particular subjects including a number of

amendments to the Civil Code and the Code of Practice. At the present time the thoroughgoing revision of the Code of Practice that has been underway since 1950 is in its final stages. About two-thirds of it is already in the hands of the West Publishing Company.

By and large, Louisiana's system of procedure has been basically sound and effective. In some areas needlessly confusing rules have impeded instead of simplified the administration of justice, and in others Louisiana has been slow in its adoption of procedural devices that have been tried and proven in practice elsewhere. The draft of the new code contains what is primarily a simplification of our procedural practices that have established their merit over the years in combination with certain modern devices, the most important of which have already been adopted on the recommendation of the Institute. That it will constitute an achievement of the highest order is firmly believed, although the ultimate decision must rest in the lap of time.

Although certain portions of the draft of the Code of Practice have not yet finally cleared the Council, newly appointed committees are meeting to consider preliminary drafts of a revision of the Code of Criminal Procedure. There is also hope that with the coming of the next fiscal year work may begin on the preparation of a Code of Evidence. In addition, mindful of recurrent demands for clarification of the vastly important mineral law of the state, the Institute has undertaken a detailed study of the law of oil and gas looking toward the formulation of proposals for its clarification. Finally, a study of the law of trusts has also been instituted with a view to the modernization of this increasingly important area of the law.

All of the projects mentioned may be counted as preliminary warming-up exercises to the revision of the Civil Code, an undertaking that, because of the intimate way it will affect the interests of the whole people of Louisiana, overshadows all of the others. In the process much has been learned about the problems of law revision and how to resolve them. The Institute has come a long way since it submitted to the Legislature its first group of statutes dealing with official and other misconduct affecting the State of Louisiana. Some may well remember how important such matters were toward the end of the 1930s. Imperfections in the work of the Institute there have been, nor is there any sound reason to believe that the last of them has been seen. One charge,

however, that cannot be made is that the possibility of improvement has been surrendered to the icy grip of inaction through fear that perfection might not be attained. And, likely it is that those who would go back to our system of criminal law as it existed prior to 1942, for example, or to the cloudy welter of statutory enactments as they existed prior to 1950, are few indeed.

Everyone seems ready to agree that law improvement and reform, as an abstract objective, is good; that clarification of the law and simplification of the judicial processes are desirable ends. But what may constitute improvement, or what may constitute clarification and simplification, may find reasonable minds poles apart. To be sure, any revision of the law may operate to deprive some members of the profession of the benefits flowing from many years of difficult study supported by knowledge gained from experiences paid for in ways too painful to recount. It may be that by destroying subtleties, revision may operate as a levelling factor to deprive the well informed of a well deserved advantage over the not-so-well informed in proceedings conducted on an adversary basis. But whether, thinking in terms of those whose interests are at stake, this is sound reasoning is another matter. Then, too, there is some tendency to believe that what one has is best. Add to this the fear of embracing evils hidden in the obscurity of the future and the way of accomplishment may be difficult indeed. Finally, even if we assume an ideal unity of purpose with opposition on personal grounds reduced to shrugs of resignation, serious differences of opinion concerning what is right, and good, and desirable, may yet exist. Hence it is that the way to law revision and reform is not a carpet of roses.

The composition of the Council of the Institute has been an important safeguard against any deficiencies in this respect. A great variety of professional interests is represented by its members, with the result that there are voices to express many different philosophical perspectives. An added assurance of thorough consideration, when matters peculiarly affecting particular interests are under consideration, comes from the solicitation of the opinions of experts not counted among the membership of the Council. This procedure serves to secure the benefit of the best informed thought on the subject under study and acts as well as a guide to what is desirable from the standpoint of

those whose interests bring them into constant contact with the problems. It provides, too, a fair hearing for those entitled to be heard. Additional dimensions of view and additional assurance of objectivity to the Council's deliberations are provided through the presence of judges and law teachers in its membership.

But a breadth of interests, learning, training, and experience is not enough. The heart of intelligent law improvement and reform is research. It guards against immature decision based on incomplete consideration resulting from insufficient knowledge of the total factual atmosphere affecting a given problem. It provides a constant challenge to provincialism. It uncovers benefits that may be gained from the experience of others and from the mistakes of the past. Successful law reform demands adequate time, facilities, and man-power for research. Without these things nothing substantial may be accomplished or great harm may be done. In this respect the Institute has not taken its responsibilities lightly. For the most part, in the selection of its reporters it has chosen law teachers. Please do not believe I am suggesting that law teachers are possessed with peculiar ability. The facts are clearly to the contrary. Nevertheless the use of members of the teaching profession as reporters accomplishes much. It provides persons who have had the opportunity denied to most members of the legal profession to devote themselves to a study of a few particular subjects and thus to become specialists therein and who have the time to give to projects that fall within the area of their professional responsibility, a responsibility that includes dedication to legal research and the furtherance of the science of law. The Bar Association committee that considered the proposed revision of the Code in 1910 may have found fault with the failure of the revision committee to consider code revision elsewhere. Hardly could such a charge be made seriously of the Institute. Conceivably it might be contended that in particular instances too much attention is given to other sources of law. But how much more damning it would be to have it truly said that the reporters and the Council consistently fail to consider other important sources of information. In any event, when the product of thorough research is brought under the close and careful scrutiny of a group of men such as one may hope always to find on the Council of the Institute, who have lived with the law in action, who possess broadness of knowledge and experience, who harbor no illusions, there

is justification for feeling reasonably assured that the ultimate care has been taken.

The State of Louisiana may take pride in its position of leadership in the field of law improvement and reform. The creation of the Legislative Council to render direct service to the members of the Legislature through the gathering of facts necessary to legislating in an intelligent fashion and by affording expert assistance in bill drafting in further support of the work of the Institute has assured a well-rounded program. Hence it is that a continuation of its leadership seems assured.

The history of Louisiana proves that it has never been lacking in the ability to recognize lack of perfection in its legal framework or the ability to visualize something better. It proves also a willingness to surrender old ways when better ways, or even ways that give promise of being better, can be found. This is the stuff of which law improvement, revision, and reform are made. And as we look back over the span of 150 years we may justly feel that we still hold high the torch whose light was first seen in 1808.